80752-3

NO. _____

(COA NO. 58623-8-I)

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

HUYEN BICH NGUYEN,
AKA GABRIELLE NGUYEN,

Appellant/Petitioner.

PETITION FOR REVIEW

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ORIGINAL

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I. IDENTITY OF PETITIONER

Gabrielle Nguyen asks this Court to accept review of the Court of Appeals decision affirming her convictions.

II. COURT OF APPEALS DECISION

A copy of the decision is attached as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

1. The appellate court adhered to its prior holding in McGuire v. Seattle, 31 Wn. App. 438, 642 P.2d 765 (1982), review denied, 98 Wn.2d 1017 (1983), that physical control of a vehicle while under the influence is a lesser included offense of driving while under the influence (DUI) – even though the penalties are exactly the same. McGuire now conflicts directly with decisions of at least two other states, holding that a lesser crime has lesser penalties[1]; it conflicts with decisions of other states holding that physical control and DUI are actually alternative crimes[2]; and

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[1] State v. Deem, 40 Ohio St.3d 205, 533 N.E.2d 294 (1988) (Ohio Supreme Court sets for three part test to determine when an offense may be a lesser included of another offense, including "[a]n offense may be a lesser included offense of another if ... the offense carries a lesser penalty than the other"); People v. Rush, 16 Cal.App.4th 20, 20 Cal. Rptr. 15 (Cal. App. 2 Dist. 1993) ("Ordinarily, when all of the elements of one offense carrying lesser penalties are expressly contained within the elements of another offense carrying greater penalties, the former is a lesser included offense of the latter."), disapproved on other grounds, People v. Montoya, 33 Cal.4th 1031, 94 P.3d 1098, 16 Cal.Rptr. 3d 902 (2004).

[2] State v. Stevens, 138 P.3d 1262, review granted, 2006 Kan. LEXIS 743 (Kan. 2006); State v. Bryan, 2004 Tenn. Crim. App. LEXIS 598 (Tenn. Crim. App.), appeal denied, 2004 Tenn. LEXIS 1083 (2004), *7-9; State v. Preston, 1997 Tenn. Crim. App. LEXIS 102 (Tenn. Crim. App. 1997), *5-6; Hogan v. State, 178 Ga. App. 534, 535-36, 343 S.E.2d 770 (1986).

it conflicts in principle with this Court's recent decision in State v. Weber, 159 Wn.2d 252, 265-69, 149 P.3d 646 (2006), cert. denied, 127 S.Ct. 2986 (2007), holding that the length of the sentence is critical to deciding whether one is a lesser of another. Should McGuire, therefore, be revisited?

2. In Cleppe[3] and Bradshaw,[4] this Court held that the burden of proving unwitting possession of cocaine was on the defense – based on interpretation of the statute criminalizing such possession. Neither Cleppe nor Bradshaw, however, entered a holding on whether that allocation of the burden of proof violated constitutional protections. Should this Court grant review to evaluate whether the due process clause protections announced in Dotterweich,[5] Staples,[6] and Balint[7] prohibit the legislature from making this malum in se drug crime, carrying the stigma and punishment of a felony, into a strict liability offense?

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[3] State v. Cleppe, 96 Wn.2d 373, 635 P.2d 435 (1981), cert. denied, 456 U.S. 1006 (1982).

[4] State v. Bradshaw, 152 Wn.2d 528, 98 P.3d 1190 (2003), cert. denied, 544 U.S. 922 (2005).

[5] United States v. Dotterweich, 320 U.S. 277, 64 S.Ct. 134, 88 L.Ed. 48 (1943).

[6] Staples v. United States, 511 U.S. 600, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994).

[7] United States v. Balint, 258 U.S. 250, 42 S.Ct. 301, 66 L.Ed. 604 (1922).

3. The general rule under Brand,[8] Pierce,[9] Downs[10] and Likakur[11] is that the trial court can accept a jury trial waiver without personal inquiry of the defendant, *unless* the record shows special circumstances – such as prior incompetency or mental illness – that trigger a need for personal inquiry. Given that the record in this case showed a lengthy period of prior incompetency, mental illness, and swings from incompetency to competency, does the appellate court's ruing that no such inquiry was required here conflict with the rule established by the four appellate court cases listed above?

IV. STATEMENT OF THE CASE

When Officer Magallan drove toward I-5 South via the Howell Street on ramp in the early morning hours of February 14, 2003, there was already a car there. Ms. Nguyen sat behind the wheel of a BMW which was still on. Most of the car was off the road on the "gore point"– the triangle between the on ramp and I-5 itself. She was talking on the cell phone. The officer thought she might be calling for assistance (and indeed

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[8] State v. Brand, 55 Wn. App. 780, 792-93, 780 P.2d 894 (1989), review denied, 114 Wn.2d 1002 (1990), grant of post-conviction relief denied on different grounds (due to procedurally improper collateral attack), 120 Wn.2d 365, 842 P.2d 470 (1992).

[9] State v. Pierce, 134 Wn. App. 763, 142 P.3d 610 (2006).

[10] State v. Downs, 36 Wn. App. 143, 145, 672 P.2d 416 (1983), review denied, 100 Wn.2d 1040 (1984).

[11] State v. Likakur, 26 Wn. App. 297, 300-01, 613 P.2d 156 (1980).

she was), so he waited a minute or two until she finished. He then asked her to roll down the window. 3/23/06 VRP:27-30; id. VRP:114.

The officer asked if she needed assistance. He then noticed what he considered the smell of alcohol and some inappropriate mannerisms, so he began to suspect DUI. 3/23/06 VRP:30-35.

Instead of summoning assistance, the officer directed Ms. Nguyen herself to drive the car to a safer place so that he could ask her to perform field sobriety tests. He later testified that he directed her to pull across the on-ramp and park on the far right shoulder. 3/23/06 VRP:30-35.

Ms. Nguyen, however, drove forward towards I-5 and then, staying in the entrance/exit lane, drove right off at the next exit: the downtown Convention Center. She exited, turned left under the Convention Center, and parked safely in the lighted area there that was completely off the road. 3/23/06 VRP:35-43. The officer agreed that this was one of the safest places that she could have chosen. 3/23/06 VRP:116.

She performed field sobriety tests. Given her performance – combined with her inappropriate and speedy mannerisms as well as her suggestive comments to him – the officer believed that she was likely intoxicated. 3/23/06 VRP:43-65. He then placed her under arrest. 3/23/06 VRP:65-66.

He searched Ms. Nguyen's car, and found a small baggie of

cocaine on the front console between the two seats. 3/23/06 VRP:67.

The officer had the car impounded and took Ms. Nguyen to a hospital for a blood test. 3/23/06 VRP:75. It revealed both alcohol and a small amount of cocaine in her bloodstream. 3/23/06 VRP:73; 3/27/06 VRP:207 (parties stipulated to blood levels); Stipulation, CP:27.

When the case was finally tried, the defense lawyer waived jury. 3/26/06 VRP:6. He filed a short written waiver form bearing Ms. Nguyen's signature. But Ms. Nguyen herself was never asked anything about the waiver in court, and she never said anything about it, either. Id.

The statements that Ms. Nguyen made at the hospital in response to police questioning were suppressed. 3/28/06 VRP:279; CP:169-73 (Findings regarding suppression). Thus, there was no direct evidence about who drove the car to the "gore point"; the only direct evidence of driving was the fact that she followed the officer's directions when he told her to drive the car to a safer place *after* she was stopped.

The judge – the trier of fact – ruled that this left insufficient evidence of driving. But he found sufficient evidence that she was intoxicated and in control of a car that was not completely off the roadway. He therefore acquitted her of DUI (RCW 46.61.502) and convicted her of what he called the "lesser included" offense of physical control of a vehicle while intoxicated (RCW 46.61.504), instead. 3/28/06

VRP:280-81.[12]

With respect to the cocaine possession charge (RCW 69.50.401), the judge stated that he disbelieved the testimony of Ms. Nguyen's Israeli gentleman-friend when he claimed that the cocaine belonged to him, and that he took it out of his pocket so she would not feel it while they were engaged in a romantic interlude in the car that night. But the judge placed the burden of proving "unwitting possession" of the cocaine in the car upon the defense, and ruled that the defense had fallen short. He therefore convicted Ms. Nguyen of the cocaine possession charge, also. 3/28/06 VRP:275-77; CP:157-61.

These were the facts presented at trial. But it was almost three years between the February 14, 2003, date of the arrest and the March 23, 2006, date of the trial.

The delay was due largely to Ms. Nguyen's incompetency. The first Order for a competency hearing was signed on July 7, 2004. CP:14-17. She was actually found incompetent by Washington State Hospital, and the parties stipulated that she was still incompetent as late as March 7, 2005. CP:215-16. She was not determined competent to stand trial until July 28, 2005 – two and a half years after the arrest. CP:217-18; CP:20-21.

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[12] Conclusions of Law V states: "The defendant is guilty of the crime of Physical Control of a Vehicle Under the Influence, the lesser-included crime of Driving While Under the Influence, charged in Count II of the Amended Information." Order on Bench Trial, p. 4; CP:160.

The defense Sentencing Memorandum contained extensive briefing on the duration, nature and severity of Ms. Nguyen's mental health problems.[13] The state did not disagree that her mental illness, hallucinations, and incompetency were longstanding problems that should be considered by the court. The court tried to fashion a sentence that would take account of these issue, but was constrained by the mandatory minimum. It imposed 90 days of work release on the DUI, and 90 days concurrent on the felony possession charge. 7/27/06 VRP:329; CP:183-89, 190-93.[14]

V. ARGUMENT IN FAVOR OF REVIEW

A. The 1982 Decision in *McGuire* Should be Revisited. Its Holding that "Physical Control" is a Lesser of DUI, Even Though the Penalties Are Identical, Conflicts Directly With Decisions of Other States and Conflicts in Principle With this Court's Decision in *Weber* that the Magnitude of the Penalty is Critical to Determining Whether One Offense is a Lesser of Another.

The trial court ruled that the evidence was insufficient to convict Ms. Nguyen of DUI, because of the lack of evidence that she was driving.

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[13] CP:77-150 (Sentencing Memorandum, Ex. A – 12/23/03 Western State Hospital Mental Health Evaluation; Ex. B – 3/2/05 Western State Hospital Mental Health Report; Ex. C – 6/17/05 Wise Report; Ex. D – King County Jail Records); CP:151-54 (Supplemental Sentencing Memorandum, Ex. A – 6/2/06 MacClure letter re mental health treatment); CP:174-76 (Second Supplemental Sentencing Memorandum).

[14] In defendant's allocution, she told the judge, "I was forced into this bench trial." 7/27/06 VRP:332. She described how this occurred. Id. Based solely on Ms. Nguyen's statements, the judge rejected her claim that the waiver of jury trial was not knowing. Id., VRP:336.

It convicted her of "physical control," instead, on the ground that this was a lesser included offense. 3/28/06 VRP:279-81.

It is true that when a person is charged with one crime, he or she can be convicted of either that crime, or of a lesser degree crime or a lesser included crime.[15] But he or she cannot be convicted of any other crime.[16] Hence, the conviction of physical control cannot stand unless that crime is a lesser degree or lesser included offense of DUI.

Physical control is certainly not a lesser degree of DUI, since they are crimes of the exact same degree: gross misdemeanors.[17] Nor did the appellate court say that it was a lesser degree offense.

Instead, the appellate court endorsed the holding of McGuire v. City of Seattle, 31 Wn. App. 438, that physical control is a lesser included offense of DUI.

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[15] RCW 10.61.003 ("Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense"); RCW 10.61.010 ("Upon the trial of an indictment or information, the defendant may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime"); RCW 10.61.006 ("In all other cases the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information.").

[16] State v. Peterson, 133 Wn.2d 885, 889, 948 P.2d 381 (1997) (defendant can generally be convicted only of crime charged); State v. Irizarry, 111 Wn.2d 591, 763 P.2d 432 (1988); State v. DeRosia, 124 Wn. App. 138, 150, 100 P.3d 331 (2004) (same).

[17] RCW 46.61.502(5) (DUI); RCW 46.61.504(5) (physical control); RCW 46.61.505(5) (same penalties for both crimes).

It is true that all the elements of physical control fall within the elements of DUI and, hence, that physical control meets the "legal test" for being a lesser included offense of DUI. State v. Speece, 115 Wn.2d 360, 362, 798 P.2d 294 (1990). It is also true that there was no proof of Ms. Nguyen's driving, so the "factual test" for a lesser included offense was also satisfied. Id.

But the two crimes have exactly the same penalties. RCW 46.61.505(5). The McGuire decision, which has been overruled in part,[18] never addressed this fact.

At least two other states that have discussed this matter, however, have found that it is critical. Ohio and California hold that one offense is not a true lesser of another unless the second offense has lesser penalties.[19] (On the other hand, two other states, Arizona and North Carolina, have held that one offense is not a true lesser of another unless the second

[18] State v. Votava, 149 Wn.2d 178, 66 P.3d 1050 (2003).

[19] State v. Deem, 40 Ohio St.3d 205, 533 N.E.2d 294 (Ohio Supreme Court sets for three part test to determine when an offense may be a lesser included of another offense: "[a]n offense may be a lesser included offense of another if (i) the offense carries a lesser penalty than the other; (ii) the greater offense, cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (iii) some element of the greater offense is not required to prove the commission of the lesser offense."); People v. Rush, 16 Cal.App.4th 20, 20 Cal. Rptr. 15 ("Ordinarily, when all of the elements of one offense carrying lesser penalties are expressly contained within the elements of another offense carrying greater penalties, the former is a lesser included offense of the latter.").

offense has the same or lesser penalties;[20] and another two states – Florida and Alaska –hold that the second crime need not have lesser penalties, and might even have greater penalties.[21]) Thus the appellate court's holding – that physical control can be considered a lesser included offense of DUI even though they have the same penalties – conflicts with the decisions of the courts of at least two other states on the question of whether one offense can be considered a lesser included offense of another, if their penalties are the same.

The appellate court's holding also stands in conflict with the decisions of several other states that characterize physical control and DUI as alternative crimes (rather than greater and lesser crimes).[22]

Further, the appellate court's holding conflicts in principle with this Court's recent decision in State v. Weber, 159 Wn.2d 252, 265-69, 149 P.3d 646. In that case, the defendant was convicted of second-degree

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[20] State v. Chabolla-Hinojosa, 192 Ariz. 360, 965 P.2d 94 (1998) ("A lesser-included offense can have the same or lesser penalty as the greater offense."); State v. Young, 305 N.C. 391, 289 S.E.2d 374 (1982).

[21] Sanders v. State, 944 So. 2d 203 (Fla. 2006) (lesser need not have lesser penalties); Nicholson v. State, 656 P.2d 1209, 1212 (Alaska 1982) (adjective "lesser" in applicable Criminal Rule refers to relations between elements of crimes, not relation between their penalties). Cf. State v. Jenkins, 198 Conn. 671, 504 A.2d 1053 (1986) (legislative scheme that provided for a greater penalty for kidnapping than for kidnapping with a firearm was unconstitutional).

[22] State v. Stevens, 138 P.3d 1262 (Kan. 2006); State v. Bryan, 2004 Tenn. Crim. App. LEXIS 598, *7-9; State v. Preston, 1997 Tenn. Crim. App. LEXIS 102, *5-6; Hogan v. State, 178 Ga. App. 534, 535-36, 343 S.E.2d 770.

attempted murder and first degree assault, and the parties agreed that convictions for both would violate the double jeopardy clause. So one crime had to be vacated. But the parties disagreed about which one. This Court held that, as between the convictions for second-degree attempted murder and first-degree assault, the lesser offense, for double jeopardy purposes, was the attempted murder conviction – because that was the one that carried the lesser sentence. Although Weber was decided in the context of a double jeopardy challenge, it stands for the rule that the magnitude of the penalty is critical to determining whether one offense is a lesser included offense of another. Otherwise, this Court would have ordered the assault – with the higher penalty – vacated, instead, since assault is obviously less severe than murder or attempted murder.

McGuire became the single most-cited case for the overarching principle that physical control is always a lesser included offense of DUI. It achieved this prominence despite the limited nature of its discussion of the lesser included offense issue, despite the fact that it recited only the "legal test" for lesser included offenses and never considered the penalties, and despite the fact that it was construing a City law that placed both crimes in a single ordinance rather than separating them out as separate crimes with identical penalties. While McGuire is often cited, its failure to deal with the equivalence of penalties issue makes its continuing validity

suspect. This fact, combined with the conflicts described above, militates in favor of review.

B. Review Should be Granted Because the Appellate Court's Decision that Felony Cocaine Possession is a Strict Liability Crime Conflicts With the U.S. Supreme Court's Due Process-Clause Decisions in *Dotterweich*, *Balint* and *Staples*. Newither *Cleppe* Nor *Bradshaw* Save the Appellate Court's Decision, Because They Were Based on Statutory Interpretation – Not Due Process Clause Challenges.

The trial court ruled that felony cocaine possession was a strict liability crime and placed the burden of proving unwitting possession on Ms. Nguyen, rather than on the state. 3/28/06 VRP:276.

In State v. Bradshaw, 152 Wn.2d 528, 98 P.3d 1190, this Court ruled that the drug possession statute has no mens rea requirement, and that the burden of proving the defense of unwitting possession could be placed on the defense. It relied primarily on the legislative history and plain language of the statute. It cited federal cases, but construed them as focusing on statutory interpretation. It made the general overall observation that "the legislature may create strict liability crimes," id., 152 Wn.2d at 536, and characterized its task as trying to figure out whether the legislature did so in the case of the drug possession statute.

We raise a different issue here – whether such a strict liability felony statute punishing such a malum in se crime is constitutional. This

issue was left open in Bradshaw.[23] It was also left open in State v. Cleppe, 96 Wn.2d 373, which came to the same conclusion over 20 years earlier. The Cleppe Court, like the Bradshaw Court, acknowledged the debate over whether felony drug possession is a public welfare offense for which scienter can be omitted, or a regular crime for which scienter must be implied; but it decided not to resolve that debate – it held that the legislature decided to delete any intent element, and that was the end of the inquiry.[24]

Thus, the constitutional question is an open question in this Court.

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[23] Bradshaw, 152 Wn.2d at 539 ("Bradshaw and Latovlovici also assert that without a scienter element, RCW 69.50.401 is unconstitutionally vague and violative of substantive due process principles. But they have not adequately briefed these arguments.").

[24] The Cleppe court stated in full on this point, after discussing the debate among the state appellate courts over whether this was a public welfare offense:

> We need not discuss further mala in se and mala prohibita. Suffice to say that the legislature in responding to the problem of drug abuse, one of the major social evils of our time, adopted the Uniform Controlled Substances Act. The act, as introduced in the Senate, made "knowingly" and "intentionally" elements of the misdemeanor of simple possession of a controlled substance. As the legislature worked its will on the bill, the words "knowingly or intentionally" were deleted from subsection 401(c) and the crime was upgraded from a misdemeanor to a felony. No change was made in subsection 401(a), as introduced.
>
> This conflict, if such it be, must be corrected by the legislature, not the court. The legislature has met twice since our decision in Boyer that guilty knowledge is an implicit element of the subsection 401(a) crime of delivery, and it has not revised subsection 401(a). As to subsection 401(c), the legislative intent is clear.

Cleppe, 96 Wn.2d 373, 380.

The appellate court's decision on this issue conflicts in principle with substantial U.S. Supreme Court authority. The starting point for analysis is the rule that crimes lacking scienter requirements are disfavored. "In our jurisprudence guilt is personal." Scales v. United States, 367 U.S. 203, 224-25, 81 S.Ct. 1469, 6 L.Ed.2d 782 (1961). "The existence of a mens rea is the rule of, rather than the exception to, principles of Anglo-American jurisprudence." United States v. United States Gypsum Co., 438 U.S. 422, 436, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978) (citation omitted). As explained in Morissette v. United States, 342 U.S. 246, 250-01, 72 S.Ct. 240, 96 L.Ed.2d 288 (1952), "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."

The only exception to the rule requiring scienter is for "public welfare offenses." Morissette v. United States, 342 U.S. 246, 254. "Public welfare offenses" are regulatory crimes. Their purpose is to regulate "industries, trades, properties or activities that affect public health, safety, or welfare." Id.; United States v. Launder, 743 F.2d 686, 689 (9th Cir. 1984). They are not the traditional, malum in se, crimes; "These cases do not fit neatly into any of such accepted classifications of common-law offenses,

such as those against the state, the person, property, or public morals." Morissette, 342 U.S. at 255. In fact, public welfare offenses "are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty." Morissette, 342 U.S. at 255.

But drug possession has clearly been classified as a malum in se crime against society and against morals. State v. Hennings, 3 Wn. App. 483, 475 P.2d 926 (1970). In fact, it was for that reason that the appeallate court implied the element of intent into controlled substances offenses in State v. Smith, 17 Wn. App. 231, 562 P.2d 659 (1977), review denied, 89 Wn.2d 1022 (1978). (Although Bradshaw and Cleppe held to the contrary, as we discussed above, they leave open this constitutional issue that was the subject of Smith.) Under Morissette, this should place it outside the category of public welfare offenses for which scienter can be deleted (or presumed).

Further, this Court has ruled that drug possession does have a victim – the public at large.[25] This also places cocaine possession outside the category of public welfare crimes described by Morissette, as having no real victim. Morissette, 342 U.S. at 255.

In addition, public welfare crimes are generally those with relatively

[25] State v. Haddock, 141 Wn.2d 103, 110-11, 3 P.3d 733 (2000); State v. Williams, 135 Wn.2d 365, 368, 957 P.2d 216 (1998) (same).

small penalties, and no felony stigma.[26] But Ms. Nguyen's cocaine possession is a felony, and the stigma and penalties associated with that categorization are not a trivial matter; the statutory maximum is 5 years. RCW 69.50.4013(2). Cocaine possession does not fit into the public welfare offense exception for this reason, either.

In fact, the drug crimes that the Supreme Court has placed into the "public welfare" category have been truly regulatory. United States v. Balint, 258 U.S. 250, 252 (upholding felony conviction for tax crime involving sale of opium without required paperwork, with no mens rea). The cocaine possession crime at issue here is not a tax collection device or other means of regulation.

Since this is not a public welfare statute, the question is whether scienter should be implied. Bradshaw (like Cleppe before it) said that the answer is no based on legislative intent, not federal constitutional analysis.

But recent U.S. Supreme Court decisions have applied a "knowledge" requirement to criminal statutes, *even where the statute's language and history did not require it*, when the crime could not be characterized as a public welfare offense. E.g., Staples v. United States, 511

[26] United States v. Dotterweich, 320 U.S. 277, 280-81, 64 S.Ct. 367, 88 L.Ed.492 (1943) (upholding strict criminal liability under Food and Drug Act regulations designed "to keep impure and adulterated food and drugs out of the channels of commerce," in part because crime was just a misdemeanor). "[P]ublic welfare offenses generally are ones where the penalty is relatively small, [and] where conviction does not gravely besmirch." United States v. Nguyen, 73 F.3d 887, 891 n.1 (9th Cir. 1995) (quotations omitted).

U.S. 600, 114 S.Ct. 1793, 128 L.Ed.28 608 (1994).

Given the rule that statutes are interpreted to avoid constitutional questions (Cheek v. United States, 498 U.S. 192, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991)), the same result should apply here.

For each of these reasons, review of this constitutional issue – left untouched by Cleppe and Bradshaw – is appropriate here.

C. The Appellate Court's Decision that a Written Jury Trial Waiver Sufficed, Conflicts with the Line of Appellate Court Decisions (*Pierce*, *Brand*, *Downs*, *Likakur*) Holding that Where Special Circumstances, Such as Prior Incompetency and Mental Illness, Exist, Direct Inquiry of the Defendant is Required.

1. The General Rule, and the Exception Requiring Direct Inquiry of the Client Under Brand, Pierce, Downs, and Likakur For Special Circumstances Like Prior Incompetency

Defense counsel told the trial court that Ms. Nguyen waived the right to jury trial and filed the signed form, but there was no advice to, or inquiry of, Ms. Nguyen anywhere on the record.

The general rule, under Brand, Pierce, Downs and Likakur, is that no inquiry of the defendant is necessary *unless* the record shows special circumstances, such as a prior finding of incompetency or mental illness: "*absent circumstances that initially raise a question regarding the defendant's capacity to waive a jury trial*, the trial court need not conduct an independent inquiry on that issue prior to accepting the waiver." State

v. Downs, 36 Wn. App. 143, 145 (emphasis added) (quoting Likakur, 26 Wn. App. 297, 300-01).

So there are at least some circumstances that trigger the need for direct inquiry of the defendant before accepting a jury trial waiver. The question is whether the appellate court's decision, that at the time of the jury trial waiver no such "circumstances that initially raise a question regarding defendant's capacity to waive a jury trial," Downs, 36 Wn. App. at 145, existed here, warrants review.

2. *Given the Extensive Evidence of Prior Incompetence and Mental Illness, Including Evidence of the Defendant's Own Denial of Incompetency, in the File Before the Court at the Time of the Jury Trial Waiver, The Failure to Inquire Directly of Ms. Nguyen Conflicted with Brand, Pierce, Downs, and Likakur*

Ms. Nguyen was charged on March 23, 2004. CP:1-6.

More than a year of incompetency followed. This is clear from the court file. At the time of the jury trial waiver, the trial court file contained prior orders mandating that Ms. Nguyen obtain and maintain mental health treatment, mandating evaluation by Western State, determining that she was incompetent, and not determining until months later that she had finally regained competency sufficient to stand trial.[27]

[27] CP:212 (4/6/04 Conditions of Release for Defendant Pending Appeal, containing requirement that Ms. Nguyen "continue treatment @ Seattle Mental Health"); CP:14-17 (7/7/04 Order for Out of Custody Competency Evaluation at Western State Hospital);

In fact, the record even contained the detailed reports of Ms. Nguyen's lengthy history of mental illness starting years and years before this arrest, including her history of psychiatric problems and physician contacts and treatment. CP:219-229 (12/29/05, Forensic Mental Health Report).

The December 29, 2005, Forensic Mental Health Report by WSH (dated March 2, 2005), even contains summaries and copies of a variety of previous reports and findings raising red flags of all sorts about Ms. Nguyen's competency. Its report about Ms. Nguyen's history showed that she was in counseling (CP:219-22); that her background of mental health problems was long and serious, including the fact that she would "speak[] in tongues"; that she had been hospitalized before for psychiatric problems, specifically having visions of "Moses and Elijah" and that this recurred in 2002 after she fasted for six days. It continues with Ms. Nguyen's reports of having seen visions of angels and demons since childhood. It states that she last saw demons two years ago and regarded these visions as gift from God. CP:222.

The Record Review portion of this same report from the court file

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CP:18 (8/11/04 Western State still evaluating Ms. Nguyen); Sub No. 21 (8/11/04 competency evaluation pending); CP:215-16 (3/7/05 Clerk's Minutes stating counsel stipulate defendant not yet competent based on WSH report, defendant must continue treatment); CP:217-18 (7/28/05, defendant finally found competent).

shows (CP:222-25) that Ms. Nguyen was involuntarily hospitalized twice in King County, once on 12/12/98 and once on 2/22/99. It shows a further evaluation but not detention on 2/30/00. It continues by documenting her history of alcohol and cocaine abuse.

This report even contains descriptions of such severe domestic abuse that it should trigger concerns about organic brain injury. It summarizes an August 2, 1996, evaluation, following an assault by her husband, in which she was pushed to the pavement and suffered a concussion and contusions. It summarizes prior diagnoses of Substance Abuse Psychosis (12/16/98), characterizations as gravely disabled (2/22/99), psychotic and paranoid (12/30/00). CP:222-23.

It contains WSH records, specifically the Knopp Report of 12/19/03, containing a diagnosis of Psychotic Disorder Not Otherwise specified. This report summarizes her history of domestic abuse, her migraine headaches since that abuse, and her family history of mental illness including her sister's diagnosis of bipolar disorder. CP:223.

It contains an additional medical report (this one by Dr. Andrew Hwang, 2/6/04) in which Nguyen admitted to auditory hallucinations in which God spoke to her. This report contains an additional diagnosis of Major Depression, recurrent, with psychotic symptoms. CP:223-24.

Another report in the record at that time contains another diagnosis

of psychosis. Specifically, Cecelia MacClure, a therapist at Valley Counseling, states in her report of 9/16/04 that despite an initial diagnosis of Psychotic Disorder Not Otherwise specified, Ms. Nguyen did not want counseling because she viewed her hallucinations as gifts rather than problems. CP:225-26.

This report then summarizes (CP:225-26) that Ms. Nguyen suffers long-term memory colored by mental disorder; it characterizes her intellectual functioning as average, but her insight as poor given the fact that she does not believe that she is mentally ill.

These reports were in the file before and during the time the judge was offered the jury trial waiver and they show just how seriously mentally ill Ms. Nguyen is. *They even characterize her inability to recognize her own mental illness as an indication of lack of insight.*

Ms. Nguyen's case history raised all the red flags that it possibly could: consistent and longstanding history of severe mental illness and incompetency, including psychosis, visual and auditory hallucinations, indications of organic brain damage from beatings, plus denial and lack of insight into her own mental illness. This is especially true given this Report's final diagnostic formulation (CP:226), that Ms. Nguyen currently suffers from Psychotic Disorder Not Otherwise specified, as well as cocaine and alcohol abuse.

The appellate court's decision thus conflicts with authority holding that where the defendant has been found to be incompetent, or to be mentally ill, at least once during the course of the proceedings, then a written jury waiver alone with no further inquiry or assent on the record is insufficient – a fuller inquiry into voluntariness is required. See Downs, 36 Wn. App. 143-45 (reciting general rule that there is no need for a full inquiry prior to a jury trial waiver, and then the exception for special circumstances such as a finding of incompetency); Likakur, 26 Wn. App. at 300-01 (evidence in the record of prior psychosis and disagreement among doctors over prior competency findings triggered need for extended inquiry prior to acceptance of jury trial waiver).

A written waiver may be effective to make this showing in some cases. But that is only when the defendant is "demonstrably aware" of the right to jury trial, and the writing effectively shows a knowing waiver of that right. State v. Acrey, 103 Wn.2d 203, 208, 611 P.2d 957 (1984).

Similarly, a statement on the record by defense counsel may suffice in some cases. But that is only when the record, fairly read, indicates that the defendant knew, heard, and understood what the lawyer was saying – otherwise, the lawyer's statements alone without the

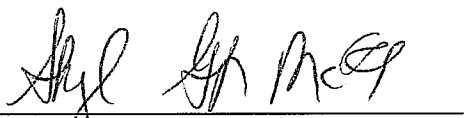
defendant's on-the-record assent are insufficient. [28]

The appellate court's decision to affirm despite the absence of any inquiry of the defendant on the subject of the jury trial waiver thus conflicts directly with prior appellate court authority on this point.

Her case, therefore, has all the earmarks of a case in which the most searching inquiry about the validity of a jury trial waiver is required. Yet she did not even get the minimal on-the-record inquiry about the voluntariness of her jury trial waiver that the much more clearly competent defendant in Likakur got. Under Likakur, and under the other appellate court cases reciting the same rule as Likakur, further inquiry was required.

DATED this 18th day of September, 2007.

Respectfully submitted,



Sheryl Gordon McCloud, WSBA No. 16709
Attorney for Petitioner, Gabrielle Nguyen

[28] State v. Stegall, 124 Wn.2d 719, 730-31, 881 P.2d 979 (1994) (no valid waiver where attorney waives right to 12 person jury on the record in open court where the record "arose suddenly," there was no indication that counsel and client conferred on the point, but there was indication that counsel waived a full jury "to avoid the embarrassment of proceeding with jury selection with a broken zipper on his fly").

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 18th day of September, 2007, a copy of the PETITION FOR REVIEW was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

Andrea Vitalich, Sr. Deputy Prosecutor
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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. HUYEN BICH NGUYEN, AKA GABRIELLE NGUYEN, Appellant.	)	No. 58623-8-I DIVISION ONE UNPUBLISHED OPINION FILED: August 27, 2007

GROSSE, J. – A written jury trial waiver is sufficient where a defendant has been found to be competent. Here, there is no need for an additional colloquy on the record where the record contains evidence of incompetence in the recent past, treatment for that incompetence and a subsequent certification and diagnosis of competency. The judgment and sentence is affirmed.

FACTS

On February 15, 2003, at approximately 2:40 a.m., Trooper C.F. Magallon from the Washington State Patrol noticed a BMW partially pulled over on the Howell on-ramp to southbound I-5. Trooper Magallon approached the vehicle and found Gabrielle Nguyen talking on the cell phone. No one else was in the vehicle. Nguyen told Magallon that she had pulled over to take the cell phone call and would be on her way. During this conversation, Magallon noticed an obvious odor of alcohol and asked Nguyen if she would take a field sobriety test. She agreed.

Because Nguyen was in an unsafe position, Trooper Magallon told Nguyen to drive over to the shoulder across from the on-ramp. Nguyen drove past the area designated by the trooper and continued down the freeway to the Union Street exit and pulled in at a turnout under the Washington State Convention Center. Nguyen exited the vehicle and met the trooper on the sidewalk. As he was explaining the sobriety test, Nguyen told the trooper he was cute and asked if he had a girlfriend.

Nguyen was unable to successfully perform the sobriety tests. A portable breath test given at the scene indicated a 0.08 result. Nguyen continued to act erratically and tried to hug the trooper. Trooper Magallon arrested Nguyen, advised her of her Miranda[1] rights and placed her in his patrol car. The trooper then searched Nguyen's car incidental to the arrest. He found a small baggie containing cocaine in the center console of the car. Next to the baggie was a small cut plastic straw.

Trooper Magallon drove Nguyen to Harborview Hospital for a blood draw. The test indicated a 0.09 blood ethanol level and the presence of cocaine in her system. The bag of white powder found in the car was also tested and found to contain cocaine.

Nguyen was charged with one count of possession of cocaine and one count of driving while under the influence. At a bench trial, a witness for the defense testified that the cocaine was his in the car and that Nguyen did not know it was there. The court found her guilty of possessing cocaine. But the

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

court found insufficient evidence that Nguyen was driving the vehicle and found her guilty of the lesser included offense of physical control of a vehicle under the influence.

Nguyen appeals.

ANALYSIS

Waiver of Jury Trial

A criminal defendant has the constitutional right to be tried by a jury.[2] A decision to waive the right to a jury trial must be made knowingly, intelligently, and voluntarily.[3] The right to a jury trial may be waived for tactical reasons "while still preserving to the accused the right to a fair trial."[4] A written waiver of the right to a jury trial constitutes strong evidence that a waiver is valid, particularly when coupled with trial counsel's representations to the court that the right is being waived intelligently and voluntarily.[5]

Nguyen contends that the trial court's failure to canvass Nguyen directly about her waiver of jury trial was error because the court knew or should have known that Nguyen's competency was an issue in the past. This court in State v. Downs[6] rejected an argument that a colloquy between a defendant and trial judge is necessary in addition to a written waiver. The Downs court noted that the determination of a knowing, intelligent, and voluntary waiver depends upon

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[2] State v. Stegall, 124 Wn.2d 719, 723, 881 P.2d 979 (1994).
[3] Stegall, 124 Wn.2d at 725.
[4] State v. Likakur, 26 Wn. App. 297, 303, 613 P.2d 156 (1980).
[5] State. v. Brand, 55 Wn. App. 780, 788, 780 P.2d 894 (1989), rev. denied, 114 Wn.2d 1002 (1990).
[6] 36 Wn. App. 143, 145, 672 P.2d 416 (1983).

all of the facts and circumstances in existence at the time.[7] In holding that there was not an affirmative duty to engage in colloquy, the court cited State v. Likakur.[8] In Likakur, the court held that where there were no circumstances which raise questions regarding the defendant's capacity - there is no need to conduct an independent inquiry before accepting a defendant's waiver.[9]

The charges were not filed until March 2004. A year prior to the filing of these charges, Nguyen was found incompetent in connection with an unrelated misdemeanor charge. In July 2004, the court in this case ordered a competency evaluation for Nguyen. In March 2005, staff at Western State Hospital again found her incompetent.

Nguyen then hired Dr. Frederick Wise to assess her mental status. In June 2005, Dr. Wise concluded that Nguyen was competent and high functioning. On the basis of his evaluation, Nguyen was found competent and this matter was set for trial.

Trial commenced on March 23, 2006. Nguyen executed a written waiver of her right to a jury trial. Before trial, defense counsel noted that this matter was delayed for a long period because of earlier findings that Nguyen was not competent. Defense counsel averred that there was now no issue with regard to competency. Because the case presented some technical defenses, counsel stated that the matter would be better tried before the bench than a jury and that Nguyen agreed with him.

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[7] Downs, 36 Wn. App. at 145.
[8] 26 Wn. App. 297, 613 P.2d 156 (1980).
[9] Likakur, 26 Wn. App. at 300-01; Downs, 36 Wn. App. at 145.

Nguyen argues that under these circumstances, the trial court should not have accepted the written waiver without making further examination into her waiver of her right to a jury trial. She contends that the previous findings of incompetence should have waived a red flag for the trial judge. Nguyen relies upon United States v. David[10] as support for the proposition that in cases where concerns arise regarding a defendant's current mental health status or competency to stand trial, a trial court should exercise greater caution in ensuring that a jury waiver is valid.

But in David, unlike here, there was still an issue of whether the defendant was competent to stand trial. David's own counsel expressed concerns to the trial court about David's competency and his ability to waive his jury trial. The David court held that "counsel's first-hand evaluation of a defendant's ability to consult on his case and to understand the charges and proceedings against him may be as valuable as an expert psychiatric opinion on his competency."[11] Moreover in David, the questions that the trial court did ask the defendant elicited responses that were equivocal and indicated that David may not have understood the nature of his right to a jury trial or even that he was not required to waive that right.[12] David is distinguishable from the present case. Here, Nguyen's counsel clearly stated that he had full confidence in Nguyen's ability to understand the waiver.

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[10] 511 F.2d 355 (D.C. Cir. 1975).
[11] David, 511 F.2d at 360.
[12] David, 511 F.2d at 362.

Furthermore, it is not a history of incompetence that warrants additional inquiry by the trial court. Instead, it is whether or not a defendant is mentally ill at the time of the waiver.[13] In the context of a waiver of the right to counsel, this court recently held that "in determining the 'knowing' waiver of a right to counsel [it] is the state of mind and knowledge of the defendant at the time the waiver is made."[14]

In addition to the written waiver, Nguyen's counsel asserted that he "personally [had] no belief of any kind that Ms. Nguyen is incompetent." He further stated:

> I think that she has recovered fully. She went through mental health court, which was very successful. So, I don't have any issue now with competency, which I think I should probably put on the record. Also, we believe that there are some technical defenses in this case, which would be much better tried to a court than to a jury. Ms. Nguyen agrees with me. We have executed a waiver of jury trial.

Additionally, in response to a query by the court about whether further inquiry needed to be made, counsel stated:

> I think, your Honor, and for the record, I should indicate that I went over that with my client in detail, and I told her she had an absolute right, a constitutional right, to a jury trial. And she is voluntarily giving that up. And I think the reasons make sense.

An examination of the record revealed the technical defenses that Nguyen's counsel sought to introduce. The trial court was correct in relying upon the written waiver of jury trial. Nguyen does not argue that she was incompetent

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[13] Brand, 55 Wn. App. at 787.
[14] State v. Modica, 136 Wn. App. 434, 445, 149 P.3d 446 (2006) (quoting United States v. Erskine, 355 F.3d 1161, 1169-79 (9th Cir. 2004)).

to waive her right to jury trial, but only that such waiver should have been subject to a colloquy because she was previously found to be incompetent. The decision of whether a person waived their right to a jury trial is whether under the circumstances of the particular case, that waiver was knowingly, voluntarily and intelligently waived.[15]

Lesser Included Offense

Nguyen argues that physical control of an automobile while under the influence is not a lesser included offense of driving while under the influence. This court has already decided this question in McGuire v. Seattle.[16] There, the court held that being under the influence while in physical control of an automobile is a lesser included offense of driving while intoxicated.[17]

Nguyen cites State v. Weber[18] as support for the position that crimes that contain the same penalty can never be lesser included offenses. Nguyen's reliance upon Weber is misplaced. Weber held that for purposes of double jeopardy the "lesser" crime is the conviction that carries the lesser punishment.[19] Weber did not address the question of whether one crime can be a lesser included offense of another.

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[15] Stegall, 124 Wn.2d 725 (citing Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)).
[16] 31 Wn. App. 438, 642 P.2d 765 (1982), overruled in part on other grounds by State v. Votava, 149 Wn.2d 178,188-89, 66 P.3d 1050 (2003) (overruling McGuire's holding that a defendant who has been charged with being in physical control of a vehicle while under the influence is entitled to the defense of safe driving even if the defendant did not personally drive the vehicle off the roadway).
[17] McGuire, 31 Wn. App. at 444.
[18] 159 Wn.2d 252, 265-69, 149 P.3d 646 (2006).
[19] Weber, 159 Wn.2d at 269.

The trial court properly ruled that physical control is a lesser included offense of driving under the influence.

Due Process

Nguyen argues that strict liability for possession of a controlled substance violates her due process.

The statute prohibiting possession of a controlled substance does not contain a mens rea element.[20] Possession is a strict liability crime.[21] The State is not required to prove either knowledge or intent to possess, nor the knowledge as to the nature of the substance.[22] A defendant may, however, raise the judicially created affirmative defense of unwitting possession. Unwitting possession can excuse the defendant's behavior, notwithstanding the fact that the defendant has violated the letter of the statute.[23]

The Supreme Court in State v. Bradshaw[24] recognized the legislature's authority to create a crime without a mens rea element. Nevertheless, Nguyen argues that Bradshaw was decided on principles of statutory construction and is not controlling on the question of whether the lack of a mens rea for possession coupled with the imposition of the affirmative defense of unwitting possession violates due process.

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[20] RCW 69.50.401; State v. Cleppe, 96 Wn.2d 373, 635 P.2d 436 (1981).
[21] State v. Hernandez, 95 Wn. App. 480, 484, 976 P.2d 165 (1999) (citing State v. Vike, 125 Wn.2d 407, 412, 885 P.2d 824 (1994)).
[22] State v. Staley, 123 Wn.2d 794, 799, 872 P.2d 502 (1994); State v. Pierce, 134 Wn. App. 763, 774, 142 P.3d 610 (2006).
[23] State v. Knapp, 54 Wn. App. 314, 317-18, 773 P.2d 134, rev. denied, 113 Wn.2d 1022 (1989).
[24] State v. Bradshaw, 152 Wn.2d 528, 532, 98 P.3d 1190 (2004), cert. denied, 544 U.S. 922 (2005).

The State has the burden of proving the elements of unlawful possession of a controlled substance as defined in the statute – the nature of the substance and the fact of possession. A defendant then can argue that such possession was unwitting.

Nguyen argues that the due process clause as expounded on in Morissette v. United States,[25] United States v. Dotterweich,[26] Staples v. United States,[27] United States v. Ballint,[28] and Clark v. Arizona,[29] prohibits the enactment of a strict liability offense. But none of those cases held that a legislature cannot constitutionally create a crime with no mens rea. Rather, each of those cases was devoted to determining whether congress had in fact done so. Each is consistent with Bradshaw.

The judgment and sentence is affirmed.

Grosse, J

WE CONCUR:

Schindler, ACJ

Coleman, J

[25] Morissette v. United States, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952).
[26] United States v. Dotterweich, 320 U.S. 277, 64 S. Ct. 134, 88 L. Ed. 48 (1943).
[27] Staples v. United States, 511 U.S. 600, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994).
[28] United States v. Balint, 258 U.S. 250, 42 S.Ct. 301, 66 L. Ed. 604 (1922).
[29] Clark v. Arizona, ___U.S.___,126 S. Ct. 2709, 165 L. Ed. 2d 842 (2006).